

Assembly Bill No. 1329

CHAPTER 228

An act to add and repeal Section 20175.2 of the Public Contract Code, relating to public contracts.

[Approved by Governor September 6, 2005. Filed with
Secretary of State September 6, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1329, Wolk. Design-build contracting: cities.

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law, until January 1, 2006, permits certain counties, with the approval of the board of supervisors, to enter into design-build contracts, as defined, in accordance with specified provisions.

This bill would, until January 1, 2011, permit cities in the Counties of Solano and Yolo, with the approval of the city council, to enter into specified design-build contracts, as defined, in accordance with specified provisions. This bill would require cities that elect to use the described design-build contract procurement process to report to the Legislative Analyst's office before December 1, 2009.

This bill would also require the Legislative Analyst's office to report to the Legislature regarding the effectiveness of the design-build program.

This bill makes legislative findings of the necessity to enact special legislation with respect to cities located in the Counties of Solano and Yolo.

This bill would require specified information to be verified under oath, thus imposing a state-mandated local program by expanding the scope of an existing crime.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 20175.2 is added to the Public Contract Code, to read:

20175.2. (a) (1) This section provides an alternative procedure for bidding on building construction projects applicable in cities in the

Counties of Solano and Yolo upon approval of the appropriate city council.

(2) These cities may award the project using either the lowest responsible bidder or by best value.

(b) (1) It is the intent of the Legislature to enable cities to utilize cost-effective options for building and modernizing public facilities. The Legislature also recognizes the national trend, including authorization in California, to allow public entities to utilize design-build contracts as a project delivery method. It is not the intent of the Legislature to authorize this procedure for transportation facilities, including, but not limited to, roads and bridges.

(2) The Legislature also finds and declares that utilizing a design-build contract requires a clear understanding of the roles and responsibilities of each participant in the design-build process. The Legislature also finds that the cost-effective benefits to cities are achieved by shifting the liability and risk for cost containment and project completion to the design-build entity.

(3) It is the intent of the Legislature to provide an alternative and optional procedure for bidding and building construction projects for cities.

(4) The design-build approach may be used, but is not limited to use, when it is anticipated that it will: reduce project cost, expedite project completion, or provide design features not achievable through the design-bid-build method.

(5) If a city council elects to proceed under this section, the city council shall establish and enforce, for design-build projects, a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code, or it shall contract with a third party to operate a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code. This requirement shall not apply to any project where the city or the design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

(c) As used in this section:

(1) “Best value” means a value determined by objectives relative to price, features, functions, and life-cycle costs.

(2) “Design-build” means a procurement process in which both the design and construction of a project are procured from a single entity.

(3) “Design-build entity” means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services, as needed, pursuant to a design-build contract.

(4) “Project” means the construction of a building and improvements directly related to the construction of a building, but does not include streets and highways, public rail transit, or water resources facilities and infrastructure.

(d) Design-build projects shall progress in a four-step process, as follows:

(1) (A) The city shall prepare a set of documents setting forth the scope of the project. The documents may include, but are not limited to, the size, type, and desired design character of the buildings and site, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans or building layouts, or any other information deemed necessary to describe adequately the city's needs. The performance specifications and any plans shall be prepared by a design professional who is duly licensed and registered in California.

(B) Any architect or engineer retained by the city to assist in the development of the project-specific documents shall not be eligible to participate in the preparation of a bid with any design-build entity for that project.

(2) (A) Based on the documents prepared in paragraph (1), the city shall prepare a request for proposals that invites interested parties to submit competitive sealed proposals in the manner prescribed by the city. The request for proposals shall include, but is not limited to, the following elements:

(i) Identification of the basic scope and needs of the project or contract, the expected cost range, and other information deemed necessary by the city to inform interested parties of the contracting opportunity, to include the methodology that will be used by the city to evaluate proposals, and specifically if the contract will be awarded to the lowest responsible bidder.

(ii) Significant factors which the city reasonably expects to consider in evaluating proposals, including cost or price and all nonprice related factors.

(iii) The relative importance of weight assigned to each of the factors identified in the request for proposals.

(B) With respect to clause (iii) of subparagraph (A), if a nonweighted system is used, the agency shall specifically disclose whether all evaluation factors, other than cost or price, when combined are:

(i) Significantly more important than cost or price.

(ii) Approximately equal in importance to cost or price.

(iii) Significantly less important than cost or price.

(C) If the city chooses to reserve the right to hold discussions or negotiations with responsive bidders, it shall so specify in the request for proposal and shall publish separately, or incorporate into the request for proposal, applicable rules and procedures to be observed by the city to ensure that any discussions or negotiations are conducted in good faith.

(3) (A) The city shall establish a procedure to prequalify design-build entities using a standard questionnaire developed by the city. In preparing the questionnaire, the city shall consult with the construction industry, including representatives of the building trades and surety industry. This questionnaire shall require information including, but not limited to, all of the following:

(i) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or

association members known at the time of bid submission who will participate in the design-build contract, including, but not limited to, mechanical subcontractors.

(ii) Evidence that the members of the design-build entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, as well as a financial statement that assures the city that the design-build entity has the capacity to complete the project.

(iii) The licenses, registration, and credentials required to design and construct the project, including information on the revocation or suspension of any license, credential, or registration.

(iv) Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(v) Any prior serious or willful violation of the California Occupational Safety and Health Act of 1973, contained in Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596) settled against any member of the design-build entity, and information concerning workers' compensation experience history and worker safety program.

(vi) Information concerning any debarment, disqualification, or removal from a federal, state, or local government public works project. Any instance where an entity, its owners, officers, or managing employees submitted a bid on a public works project and were found to be nonresponsive, or were found by an awarding body not to be a responsible bidder.

(vii) Any instance where the entity, its owners, officers, or managing employees defaulted on a construction contract.

(viii) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), excluding alleged violations of federal or state law including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of Federal Insurance Contribution Act (FICA) withholding requirements settled against any member of the design-build entity.

(ix) Information concerning the bankruptcy or receivership of any member of the design-build entity, including information concerning any work completed by a surety.

(x) Information concerning all settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the design-build entity during the five years preceding submission of a bid pursuant to this section, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000). Information shall also be provided concerning any work completed by a surety during this period.

(xi) In the case of a partnership or other association that is not a legal entity, a copy of the agreement creating the partnership or association and specifying that all partners or association members agree to be fully liable for the performance under the design-build contract.

(B) The information required pursuant to this subdivision shall be verified under oath by the entity and its members in the manner in which civil pleadings in civil actions are verified. Information that is not a public record pursuant to the California Public Records Act (Chapter 3.5 of Division 7 of Title 1 of the Government Code) shall not be open to public inspection.

(4) The city shall establish a procedure for final selection of the design-build entity. Selection shall be based on either of the following criteria:

(A) A competitive bidding process resulting in lump-sum bids by the prequalified design-build entities. Awards shall be made to the lowest responsible bidder.

(B) The city may use a design-build competition based upon best value and other criteria set forth in paragraph (2) of subdivision (d). The design-build competition shall include the following elements:

(i) Competitive proposals shall be evaluated by using only the criteria and selection procedures specifically identified in the request for proposal. However, the following minimum factors shall each represent at least 10 percent of the total weight of consideration given to all criteria factors: price, technical design and construction expertise, life cycle costs over 15 years or more, skilled labor force availability, and acceptable safety record. Each of these factors shall be weighted equally.

(ii) Once the evaluation is complete, the top three responsive bidders shall be ranked sequentially from the most advantageous to the least.

(iii) The award of the contract shall be made to the responsible bidder whose proposal is determined, in writing, to be the most advantageous.

(iv) Notwithstanding any provision of this code, upon issuance of a contract award, the city shall publicly announce its award, identifying the contractor to whom the award is made, along with a written decision supporting its contract award and stating the basis of the award. The notice of award shall also include the city's second and third ranked design-build entities.

(v) For the purposes of this paragraph, "skilled labor force availability" shall be determined by the existence of an agreement with a registered apprenticeship program, approved by the California Apprenticeship Council, which has graduated apprentices in each of the preceding five years. This graduation requirement shall not apply to programs providing apprenticeship training for any craft that has been deemed by the Department of Labor and the Department of Industrial Relations to be an apprenticeable craft in the five years prior to enactment of this act.

(vi) For the purposes of this paragraph, a bidder's "safety record" shall be deemed "acceptable" if their experience modification rate for the most recent three-year period is an average of 1.00 or less, and their average

Total Recordable Injury/Illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category, or if the bidder is a party to an alternative dispute resolution system, as provided for in Section 3201.5 of the Labor Code.

(e) (1) Any design-build entity that is selected to design and build a project pursuant to this section shall possess or obtain sufficient bonding to cover the contract amount for nondesign services and errors and omissions insurance coverage sufficient to cover all design and architectural services provided in the contract. This section does not prohibit a general or engineering contractor from being designated the lead entity on a design-build entity for the purposes of purchasing necessary bonding to cover the activities of the design-build entity.

(2) Any payment or performance bond written for the purposes of this section shall be written using a bond form developed by the city.

(f) All subcontractors that were not listed by the design-build entity in accordance with clause (i) of subparagraph (A) of paragraph (3) of subdivision (d) shall be awarded by the design-build entity in accordance with the design-build process set forth by the city in the design-build package. All subcontractors bidding on contracts pursuant to this section shall be afforded the protections contained in Chapter 4 (commencing with Section 4100) of Part 1. The design-build entity shall do both of the following:

(1) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the city.

(2) Provide a fixed date and time on which the subcontracted work will be awarded in accordance with the procedure established pursuant to this section.

(g) The minimum performance criteria and design standards established pursuant to paragraph (1) of subdivision (d) shall be adhered to by the design-build entity. Any deviations from those standards may only be allowed by written consent of the city.

(h) The city may retain the services of a design professional or construction project manager, or both, throughout the course of the project in order to ensure compliance with this section.

(i) Contracts awarded pursuant to this section shall be valid until the project is completed.

(j) Nothing in this section is intended to affect, expand, alter, or limit any rights or remedies otherwise available at law.

(k) (1) If the city elects to award a project pursuant to this section, retention proceeds withheld by the city from the design-build entity shall not exceed 5 percent if a performance and payment bond, issued by an admitted surety insurer, is required in the solicitation of bids.

(2) In a contract between the design-build entity and the subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld may not

exceed the percentage specified in the contract between the city and the design-build entity. If the design-build entity provides written notice to any subcontractor who is not a member of the design-build entity, prior to or at the time the bid is requested, that a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond to the design-build entity, then the design-build entity may withhold retention proceeds in excess of the percentage specified in the contract between the city and the design-build entity from any payment made by the design-build entity to the subcontractor.

(l) Each city that elects to proceed under this section and uses the design-build method on a public works project shall submit to the Legislative Analyst's office before December 1, 2009, a report containing a description of each public works project procured through the design-build process that is completed after January 1, 2006, and before November 1, 2009. The report shall include, but shall not be limited to, all of the following information:

- (1) The type of project.
- (2) The gross square footage of the project.
- (3) The design-build entity that was awarded the project.
- (4) The estimated and actual project costs.
- (5) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including the resolution of the protests.
- (6) An assessment of the prequalification process and criteria.
- (7) An assessment of the effect of retaining 5 percent retention on the project.
- (8) A description of the Labor Force Compliance Program and an assessment of the project impact, where required.
- (9) A description of the method used to award the contract. If the best value method was used, the report shall describe the factors used to evaluate the bid, including the weighting of each factor and an assessment of the effectiveness of the methodology.
- (10) An assessment of the project impact of "skilled labor force availability."
- (11) An assessment of the most appropriate uses for the design-build approach.

(m) Any city that elects not to use the authority granted by this section may submit a report to the Legislative Analyst's office explaining why the city elected not to use the design-build method.

(n) On or before January 1, 2010, the Legislative Analyst's office shall report to the Legislature on the use of the design-build method by cities pursuant to this section, including the information listed in subdivision (l). The report may include recommendations for modifying or extending this section.

(o) This section shall remain in effect only until January 1, 2011, and of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

SEC. 2. The Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique need to build public facilities in a cost-effective manner in cities located in the Counties of Solano and Yolo.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.